U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 25 January 2007 In the Matter of

D. A. S.
Claimant

Case No. 2005-BLA-06306

v.

SOUTH AKERS MINING COMPANY, LLC.
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

APPEARANCES:[1]
Wes Addington, Esquire
Claimant
Timothy J. Walker, Esquire
For the Employer

BEFORE: DANIEL F. SOLOMON
Administrative Law Judge

DECISION AND ORDER

DENIAL OF BENEFITS

This proceeding arises from a request for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* In accordance with the Act and the pertinent regulations, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing requested by the Employer April 18, 2004. Director's Exhibit ("DX") 25.

Claimant was last employed in coal mine work in the state of Kentucky, the law of the United States Court of Appeals for the Sixth Circuit controls. See ***Shupe v. Director, OWCP***, 12 BLR 1-200, 1-202 (1989)(en banc). Since Claimant filed this application for benefits after January 1, 1982, Part 718 applies.

Claimant filed this Application for Black Lung benefits on September 22, 2004 (DX 2). Following the development of evidence by the Department of Labor, the Department

[1] The Director, Office of Workers' Compensation Programs, was not present nor represented by counsel at the hearing.

issued a Proposed Decision and Order on August 3, 2004 finding Claimant is entitled to benefits (DX 24). The Employer requested a Hearing on April 27, 2004 (DX 26-6), and the claim was referred to the Office of Administrative Law Judges on September 19, 2004 (DX 30). A hearing was held on October 31, 2006 in Pikeville, Kentucky.

Thirty two Director's Exhibits (DX 1-DX 32) were admitted into the record for identification. See transcript, "TR" 5. One Claimant's Exhibit ("CX" 1, TR 9) and two Employer's exhibits ("EX" 1 – EX 2, TR 19) were also admitted.

Post hearing, the Employer submitted the deposition of Dr. A. Dahhan, without objection, which is admitted as EX 3. Briefs were submitted by both the Claimant and Employer.

The Claimant is now 55 years of age (DX 2). His left arm was amputated. He testified that he last worked for South Akers Mining as a section foreman at their underground mine at Dorton in Pike County, Kentucky. (Id. 11). He had worked for South Akers Mining for about 25 years and that he had been a section foreman since 1991. Id. He testified that before he was a section foreman, he ran a cutting machine, was a scoop operator, drilled coal, was a general inside laborer, rock dusted, and shoveled for South Akers Mining. Id.

All of his coal mine employment was underground. Id. 13.

He testified that as a section foreman he was required to supervise miners on the section and was responsible for maintaining the mine (Id. 12). He testified that as a section foreman he helped drag bags of rock dust and assist in rock dusting daily. The bags of rock dust weighed fifty pounds. Id. He also would assist mechanics and would have to lift equipment. Id. He also was required to lift heavy buckets of oil and change tires. A bucket weighs to 40 pounds. He often had to stoop and crawl during work because of the height of the coal seam. He worked seven years in 28 inch coal. Id. 13.

Claimant said that his work at South Akers Mining required him to work in dust. (TR 13). Claimant said that as a section foreman "you're in your returns and stuff where all the dust is supposed to settle... you go up behind the curtains and get your air readings and things and section foremen are usually in the biggest part of it, you know, the dust that's in the mine and atmosphere." (Id. 14). He also indicated that his earlier jobs running a cutting machine, scoop and coal drill were also dusty. He said "all of them three jobs create dust and the mines lack ventilation sometimes and you get more dust than others and it just boils up around the operator and that dust does …you're cutting dusty coal and none of them require … in fact, years ago, they didn't require water on them." Id.

Claimant alleged, because of his exposure to coal dust, that "black settled on me" at the end of each shift. (Id 15). He said the dust would get on his clothes and into his ears and nose. Claimant described that "an hour or so after you worked, you'd blow it out your nostrils and wash it and spit it out and stuff. It accumulates." (Id. 15).

Claimant testified that he has never smoked. (Id 15). He also testified that he used to garden and mow his lawn. However, he currently contracts out some of his yard work and neighbors and his son assists him with the rest. He says he no longer can work that hard or long because "it draws your breathing down and makes you weak." (Id 16). In fact, Claimant alleges that he is now unable to perform exertional activities. Id.

The Claimant lost his left arm in a mining accident that occurred about 11 years ago. Id. 16. But despite that, he continued to work as a foreman. Id. He also has glaucoma. The vision in the right eye has been lost. Id. 17. He had to quit driving. Id. The only prescribed medication is for the eyes. Id. 18.

APPLICABLE STANDARDS

Because the Claimant filed this application for benefits after March 31, 1980, the regulations set forth at part 718 apply. ***Saginaw Mining Co. v. Ferda***, 879 F.2d 198, 204, 12 B.L.R. 2-376 (6th Cir. 1989).

This case represents an initial claim for benefits. To receive black lung disability benefits under the Act, a miner must prove that (1) he suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) he is totally disabled, and (4) his total disability is caused by pneumoconiosis. ***Gee v. W.G. Moore and Sons***, 9 B.L.R. 1-4 (1986) (en banc); ***Baumgartner v. Director***, OWCP, 9 B.L.R. 1-65 (1986) (en banc). ***See Mullins Coal Co., Inc. of Virginia v. Director***, OWCP, 484 U.S. 135, 141, 11 B.L.R. 2-1 (1987). The failure to prove any requisite element precludes a finding of entitlement. ***Anderson v. Valley Camp of Utah, Inc.***, 12 B.L.R. 1-111 (1989); ***Perry v. Director***, OWCP, 9 B.L.R. 1-1 (1986) 1-1 (1986) (en banc).

STIPULATIONS AND WITHDRAWAL OF ISSUES

1. The Claimant is a "miner" as that term is defined by the Act, and has worked after 1969. TR 6-7.

3. The Employer agreed that the Claimant had 29 years of coal mine employment. TR 7.

4. South Akers Mining Company is the responsible operator. TR 7.

5. The Claimant has one dependent. TR 7.

After a review of the stipulations and the record, they are accepted.

REMAINING ISSUES

1. Whether the miner suffers from pneumoconiois.
2. If so, whether the miner's pneumoconiosis arose out of coal mine employment.
3. Whether the miner is totally disabled from a respiratory condition.
4. Whether the miner's total disability is due to pneumoconiosis.

BURDEN OF PROOF

"Burden of proof," as used in this setting and under the Administrative Procedure Act[2] is that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." "Burden of proof" means burden of persuasion, not merely burden of production. 5 U.S.C. § 556(d).[3] The drafters of the APA used the term "burden of proof" to mean the burden

[2] 33 U.S.C. § 919(d) ("[N]otwithstanding any other provisions of this chapter, ant hearing held under this chapter shall be conducted in accordance with [the APA]; 5 U.S.C. § 554(c)(2). Longshore and Harbors Workers' Compensation Act ("LHWCA") 33 U.S.C. § 901-950, is incorporated by reference into Part C of the Black Lung Act pursuant to 30 U.S.C. § 932(a).

[3] The Tenth and Eleventh Circuits held that the burden of persuasion is greater than the burden of production, ***Alabama By-Products Corp. v. Killingsworth***, 733 F.2d 1511, 6 B.L.R. 2-59 (11th Cir. 1984); ***Kaiser Steel Corp. v. Director***, OWCP [Sainz], 748 F.2d 1426, 7 B.L.R. 2-84 (10th Cir. 1984). These cases arose in the context where an interim presumption is triggered, and the burden of proof shifted from a Claimant to an employer/carrier.

of persuasion. ***Director, OWCP, Department of labor v. Greenwich Collieries [Ondecko]***, 512 U.S. 267, 18 B.L.R. 2A-1 (1994).[4]

A Claimant has the general burden of establishing entitlement and the initial burden of going forward with the evidence. The obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production; the obligation to come forward with evidence to support a claim. Therefore, the Claimant cannot rely on the Director to gather evidence. The Claimant bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. ***Oggero v. Director, OWCP***, 7 B.L.R. 1-860 (1985).

TIMELINESS

Timeliness is a jurisdictional matter that can not be waived. 30 U.S.C. § 932(f), provides that "[a]ny claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later": (1) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978. The Secretary of Labor's implementing regulations at 20 C.F.R. § 725.308 sets forth in part, as follows:

(a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Act of 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.

(c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, except as provided in paragraph (b) of this section, the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

Employer The Employer does not contest this issue.

I have reviewed all of the evidence in the record and nothing has been proffered to rebut the presumption.

MEDICAL EVIDENCE SUMMARY

X-rays

EX No.	Physician	Qual	Date	Reading
DX 11	Forehand	B	11/4/04	1/1[5]
DX 20	Wiot	B/BCR	11/4/04	Negative
CX 2	Miller	B/BCR	11/4/04	2/2
EX 1	Dahhan	B	4/22/05	Negative
CX 1	Ahmed	B/BCR	4/22/05	1/2

Pulmonary function studies

Exhibit No.	Physician	Date of study	Tracings present?	Flow-volume loop?	Broncho-dilator?	FEV1	FVC/ MVV	Coop. and Comp. Noted?
DX 11	Forehand	11/4/04	Yes	Yes	4.07	5.02	Good	DX 11

[4] Also known as the risk of non-persuasion, *see* 9 J. Wigmore, Evidence § 2486 (J. Chadbourn rev. 1981).

[5] This x-ray was read by Dr. Peter Barrett, B?BCR, for quality purposes. DX 12. He noted excellent film quality.

EX 1	Dahhan	4/22/05	Yes	Yes	3.18	3.88	Good	EX 1

ARTERIAL BLOOD GAS TESTS

Exh. No.	Physician	Date of Study	Altitude	Rest(R) Exer(E)	PCO2	PO2	Comments
DX 11	Forehand	11/4/04	0-2999	R E	31 32	67 85	See below[6]
EX 1	Dahhan	4/22/05	0-2999	R E	34.8 36.5	74.3 90.1	
EX 3	Dahhan depo	10/17/06	Rebuttal of DX 11; low barometric pressure reduced PO2 at rest; was corrected by exercise				

Medical Reports

Randolph Forehand, M.D.

Dr. Forehand performed a pulmonary evaluation for the Department of Labor. (DX 11). He obtained an occupational and patient history and performed a physical examination. He reported no history of smoking. Total disability was established by the aterial blood gas study. Dr. Forehand diagnosed coal workers' pneumoconiosis based on the occupational history, physical examination, chest x-ray, and aterial blood gas study. Id. Dr. Forehand listed the cause of the coal workers' pneumoconiosis as coal mine dust exposure. He found a respiratory impairment of an oxygen transfer nature, which would prevent Claimant from returning to work because of shortness of breath. He found pneumoconiosis is the sole factor contributing to disability. Dr. Forehand is board certified in allergy and immunology and board eligible in pediatric pulmonary medicine. Id.

Abdul Dahhan, M.D.

On May 3, 2005, Dr. Dahhan performed a pulmonary examination at the Employer's request. (EX 1). Dr. Dahhan noted the lost arm, that the Claimant is a nonsmoker, who has a mining history of 29 1/2 years, with all of the work underground operating a scoop, drill, and a cutting machine. He further noted a history of occasional cough with clear sputum and intermittent wheeze. The arterial blood gas study displayed hypoxemia at rest. Dr. Dahhan found:

> 1. There are insufficient objective findings to justify the diagnosis of coal workers' pneumoconiosis based on the normal clinical examination of the chest, normal pulmonary function studies from my exam and those of Dr. Forehand, adequate blood gas exchange mechanisms at rest and after exercise and negative x-ray reading for pneumoconiosis.
>
> 2. [Claimant] has no objective findings to indicate any pulmonary impairment and/or disability based on the clinical and physiological parameters of his respiratory system.
>
> 3. From a respiratory standpoint, [Claimant] retains the physiological capacity to continue his previous coal mining work or job of comparable physical demand with no

[6] The testing by Dr. Forehand was evaluated for validity by Dr. RV Mettu. DX 11. Dr. Mettu is board certified in internal and pulmonary medicine. He determined that the testing was valid. Id.

evidence of any pulmonary impairment and/or disability caused by, related to, contributed to or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis.

4. Based on my overall evaluation of [Claimant], within a reasonable degree of medical certainty, I find no evidence of pulmonary impairment and/or disability caused by, related to, contributed to or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis.

On October 17, 2006, Dr. Dahhan testified by deposition. Dr. Dahhan noted that his arterial blood gas study showed hypoxemia at rest. (EX 3, 5). He considers Dr. Forehand's study to be mild hypoxemia. (Id. 7). Dr. Dahhan also claimed that Dr. Forehand's arterial blood gas values could be explained by lower barometric pressure, but didn't cite any authority for his statement. (Id 6).

FINDINGS OF FACT

Existence of Pneumoconiosis

Pneumoconiosis is defined as a chronic dust disease arising out of coal mine employment.[7] The regulatory definitions include both clinical (medical) pneumoconiosis, defined as diseases recognized by the medical community as pneumoconiosis, and legal pneumoconiosis, defined as any chronic lung disease. . .arising out of coal mine employment.[8] The regulation further indicates that a lung disease arising out of coal mine employment includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b). As several courts have noted, the legal definition of pneumoconiosis is much broader than medical pneumoconiosis. ***Kline v. Director, OWCP***, 877 F.2d 1175 (3d Cir. 1989).

A living miner can demonstrate the presence of pneumoconiosis by: (1) chest x-rays interpreted as positive for the disease (§ 718.202(a)(1)); or (2) biopsy report (§ 718.202(a)(2)); or the presumptions described in Sections 718.304, 718.305, or 718.306, if found to be applicable; or (4) a reasoned medical opinion which concluded the disease is present, if the opinion is based on objective medical evidence such as blood-gas studies, pulmonary function tests, physical examinations, and medical and work histories. (§ 718.202(a)(4)).

X-ray Evidence

The record I consider under the rules for limitations on evidence involves five readings of two x-rays in the current record. Three readings are positive. The first x-ray, November 4, 2004, generated three readings, two of which are positive. Drs. Wiot and Miller are both dually qualified board certified B readers. Dr. Miller read the x-ray as 2/1. Dr. Wiot read it as negative for pneumoconiosis. Dr. Forehand is a B reader, but is not dually qualified.

The second x-ray, dated April 22, 2005, generated two readings. Dr. Dahhan read it as negative. He is a B reader, but is not dually qualified. Dr. Ahmed is dually qualified and read the same x-ray as 1/2.

The weight I must attribute to the x-rays submitted for evaluation with the current application are in dispute. "[W]here two or more X-ray reports are in conflict…consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." 718.202(a)(1). I am "not required to defer to…radiological experience or…status as a professor of radiology." ***Dempsey v. Sewell Coal Co***., 23 BLR 1-47 (2004).

I note that the preponderance of the readers do find pneumoconiosis.

[7] 20 C.F.R § 718.201(a).
[8] 20 C.F.R. § 718.201(a)(1) and (2) (emphasis added).

The Board has held that I am not required to defer to the numerical superiority of x-ray evidence, ***Wilt v. Wolverine Mining Co***., 14 B.L.R. 1-70 (1990), although it is within his or her discretion to do so, ***Edmiston v. F & R Coal Co***., 14 B.L.R. 1-65 (1990). See also ***Schetroma v. Director, OWCP***, 18 B.L.R. 1- (1993) (use of numerical superiority upheld in weighing blood gas studies); ***Tokaricik v. Consolidation Coal Co***., 6 B.L.R. 1-666 (1984) (the judge properly assigned greater weight to the positive x-ray evidence of record, notwithstanding the fact that the majority of x-ray interpretations in the record, including all of the B-reader reports, were negative for existence of the disease). See also ***Woodward v. Director, OWCP***, 991 F.2d 314 (6th Cir. 1993).

I note that Dr. Wiot read the first x-ray as less than optimum film quality. I note that the other readers offered by the Claimant and Peter Barrett, M.D., who read the x-ray for quality purposes (DX 12) disagree.

I note that the second x-ray was taken about five months after the first. Because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from that evidence which is older. ***Clark v. Karst-;Robbins Coal Co***., 12 B.L.R. 1-;149 (1989)(en banc); ***Casella v. Kaiser Steel Corp.***, 9 B.L.R. 1-;131 (1986).

In this case, the better qualified reader of the most recent x-ray, Dr. Ahmed, finds it is diagnostic of pneumoconiosis. The majority of readers of the first x-ray also find it is diagnostic for pneumoconiosis. I find that the majority of the readers of the first x-ray should be accorded greater weight due to their majority and due to the fact that a dispute exists as to Dr. Wiot's accuracy as to a reading of quality of this x-ray. I find that the fact that the opinion of the better qualified reader of the second x-ray substantiates the majority reading of the first.

Therefore, I find that the Claimant has established the existence of pneumoconiosis in this record. ***Woodward v. Director, OWCP***, 991 F.2d 314 (6th Cir. 1993).

CAUSATION

A miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 CFR 718.203(b). With respect to causation, I discount the opinions of Dr Dahhan, who does not accept a diagnosis of pneumoconiosis, which is contrary to the full weight of the evidence. ***Howard v. Martin County Coal Corp.***, 89 Fed.Appx. 487 (6th Cir., 2003, unpbl.). ["ALJ could only give weight to those opinions if he provided specific and persuasive reasons for doing so, and those opinions could carry little weight, at the most." ***Scott v. Mason Coal Co***., 289 F.3d 263 (4th Cir. 2002)]. ***Tapley v. Bethenergy Mines, Inc***., BRB No. 04-0790 BLA (May 26, 2005) (unpub.). The record establishes 29 years of coal mine employment. I credit the opinion of Dr. Forehand on this point. Therefore, I find that the miner's pneumoconiosis arose at least in part out of coal mine employment.

TOTAL DISABILITY

To receive black lung disability benefits under the Act, a claimant must establish total disability due to a respiratory impairment or pulmonary disease. If a coal miner suffers from complicated pneumoconiosis, there is an irrebuttable presumption of total disability. 20 C.F.R. §§ 718.204(b) and 718.304. If that presumption does not apply, then according to the provisions of 20 C.F.R. §§ 718.204(b)(1) and (2), in the absence of contrary evidence, total disability in a living miner's claim may be established by four methods: (i) pulmonary function tests; (ii)

arterial blood-gas tests; (iii) a showing of cor pulmonale with right-sided, congestive heart failure; or (iv) a reasoned medical opinion demonstrating a coal miner, due to his pulmonary condition, is unable to return to his usual coal mine employment or engage in similar employment in the immediate area requiring similar skills.

There has been no evidence of complicated pneumoconiosis introduced into this record.

Pulmonary function testing is not helpful in this case, and cor pulmonnale has not been alleged.

However, the Claimant relies, alternatively, that blood gasses or a reasoned medical opinion from Dr. Forehand has been submitted.

Claimant emphasizes that Dr. Dahhan admitted that Claimant's lungs do not transfer oxygen into his blood as normally as they should and that hypoxemia can be caused by coal mine dust exposure. Id. 9.

The PO 2 values generated by Dr. Forehand were not duplicated by Dr. Dahhan's testing. However both yield hypoxemia, although Dr. Forehand's is disabling and Dr. Dahhan's is not. All blood gas study evidence of record must be weighed. ***Sturnick v. Consolidation Coal Co***., 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise and an administrative law judge must provide a rationale for according greater probative value to the results of one study over those of another. ***Coen v. Director, OWCP***, 7 B.L.R. 1-30 (1984); ***Lesser v. C.F. & I. Steel Corp.***, 3 B.L.R. 1-63 (1981).

Employer emphasizes that Dr. Dahhan testified that the lower, admittedly abnormal pO2 values produced in Dr. Forehand's testing could have been affected by the fact that Dr. Forehand's West Virginia office is located at higher altitude and, therefore, his testing was done at a lower barometric pressure than at facilities in Kentucky. (EX 3 at 6). "In fact, Dr. Forehand's testing was done at 693 mb, while Dr. Dahhan's was done at 730 mb." See Brief.

In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner, or circumstances surrounding the testing, affected the results of the study and rendered it unreliable. ***Vivian v. Director, OWCP***, 7 B.L.R. 1-360 (1984) (miner suffered from several blood diseases); ***Cardwell v. Circle B Coal Co***., 6 B.L.R. 1-788 (1984) (miner was intoxicated).

The testing by Dr. Forehand was evaluated by Dr. RV Mettu. DX 11. Dr. Mettu is board certified in internal and pulmonary medicine. He determined that the testing was valid. Id. Both Drs. Forehand and Dahhan list the altitude as 0-2999. Although Dr. Dahhan assumed that testing was performed in West Virginia, it was performed in Richlands, Virginia. DX 11. Although I do not accept Dr. Mettu's opinion as dispositive on this issue, I find that Dr. Dahhan has not accurately depicted the respective altitudes of the examinations. Therefore I discount this opinion.

Dr. Dahhan also testified that, in Dr. Forehand's study, the plaintiff's blood gases improved with exercise. He stated that this means that even if the plaintiff is hypoxic at rest, he is not impaired or disabled because when he exerts himself, his body compensates by adding oxygen to his blood, just as it should." See Brief. I am also reminded that Dr. Dahhan also testified that the blood gases "cannot be used exclusively without looking at the rest of the parameters of the respiratory system." (EX 3 at 6). He noted that since both his and Dr. Forehand's pulmonary function studies were normal, to base total disability on the minimal to mild hypoxemia produced by the claimant's resting ABGs "cannot be supported by the medical literature." [EX 3, pp. 6-7] Employer argues that, based on both sets of ABGs, which both show

a small amount of hypoxemia that resolves with exercise, Dr. Dahhan testified that the claimant is still capable of doing the work of a coal miner or similarly strenuous work. [EX 3, pp. 7, 8].

On cross examination, Dr. Dahhan did, indeed admit that hypoxia can be caused by coal mine employment and exposure to coal dust. But he was not asked to comment on the effect that hypoxemia had on total disability. And he was not asked to apply the "mild" hypoxemia to the Claimant's medical profile and exertional capacity.

In reading the record, however, I can not determine the relationship from the hypoxemia to work. Moreover, In assessing total disability under 20 C.F.R. §718.204(c)(4) (2000) and §718.204(b)(2)(iv) (2001), I am required to compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. ***Cornett v. Benham Coal, Inc.***, 227 F.3d 569 (6th Cir. 2000) (a finding of total disability may be made by a physician who compares the exertional requirements of the miner's usual coal mine employment against his physical limitations); ***Schetroma v. Director, OWCP***, 18 B.L.R. 1-19 (1993) (a qualified opinion regarding the miner's disability may be given less weight). See also ***Scott v. Mason Coal Co.***, 14 B.L.R. 1-37 (1990)(en banc on recon.). As the Claimant was a foreman, although he did perform heavy labor on some jobs, I am unable to make the required comparison.

I do not credit Dr. Dahhan's opinion because, in large part, he failed to diagnose pneumoconiosis, which is contrary to this record. However, I note that on Dr. Forehand's blood gas exercise study, improvement is noted. There may be a valid explanation, but it is not apparent.

However, the Claimant must prove total disability through a reasoned opinion by a preponderance of the evidence. ***Director, OWCP, Department of Labor v. Greenwich Collieries*** [***Ondecko***], *supra*. Because he has failed to establish how the hypoxemia of record affects the Claimant's capacity to work, I find the Claimant has failed to establish total respiratory disability through either the testing or through a reasoned medical opinion.

Therefore, I find that the Claimant has failed to establish total disability.

TOTAL DISABILITY DUE TO PNEUMOCONIOSIS

Claimant needs to establish that pneumoconiosis is a "substantially contributing cause" to his disability. As total disability is not established, this issue is moot.

CONCLUSION

In summary, although the Claimant has established the presence of pneumoconiosis, and causation by coal mine employment, I find that the Claimant has failed to establish total disability, a required element of proof. ***Oggero v. Director, OWCP,*** *supra.* As a result, because this is an initial claim, there is no need to evaluate the remainder of the issues. He has failed to prove that one of the applicable conditions of entitlement has changed since his prior claim became final. 20 CFR § 725.309(d). Therefore, his claim for benefits is denied.

ORDER

It is ordered that the claim of **D.A.S.** for benefits under the Black Lung Benefits Act is hereby **DENIED**.

A

DANIEL F. SOLOMON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. See 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. See 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. See 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).